REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 228 OF 2018

SOSPETER OMARIBA MOGERE.....CLAIMANT/RESPONDENT

-VERSUS-

MEX LOGISTICS AFRICA LIMITED...RESPONDENT/APPLICANT

RULING

1. The Applicant filed a Notice of Motion dated 26.1.2021 seeking an order that the Respondent's suit be dismissed for want of prosecution. It further seeks costs of the application and the entire suit.

2. The application is based on grounds that no step has been taken by the Respondent since 22.1.2019 to prepare the suit for hearing; that the delay by the Respondent has been long and inordinate; that there is no reason for the delay; and that the Respondent no longer has any interest in the suit.

3. The application is supported by the affidavit of Martha Wenene, an Advocate of the High Court of Kenya, on behalf of the Applicant sworn on 26.1.2021 .She averred that the relevant rules of procedure provide for dismissal of the suit for want of prosecution where no action is taken for a period of 1 year; that the suit herein was last before this Court on 22.1.2019; and that the Respondent has since failed to fix a hearing date for the matter.

4. The Respondent filed a Replying Affidavit sworn on 18.2.2021 contending that the matter was certified ready for hearing on 22.1.2019 and the court directed that a hearing date be taken at the registry; that his advocates tried to take a hearing date but they are advised to wait for official notice from the Court as to when matters filed in 2018 would be allocated hearing dated; and that the reason for not taking a date is based on the advice from the court registry that there is lack of enough judges hence no hearing dates are given when they are sought.

5. He averred that he is desirous to prosecute the matter and urged the Court to take judicial notice that the number of judges available compared to the workload of cases pending is less. He contended that the applicant is aware of the circumstances precluding the speedy hearing of the pending cases before the court but it is feigning ignorance which amounts to an abuse of the court processes through the application.

Respondent's submissions

6. The applicant never filed any submissions to prosecute its application. However the Respondent submitted that the court record bears witness that he has been fast tracking the conclusion of the matter and that the Applicant took so long to file a response until 16.1.2019 when the court directed that it files a response within 7 days. He further submitted that the court registry has been issuing notices as to which matters are given hearing dates and that only matters filed in the year 2016 and below are given hearing dates.

7. He argued that all advocates and litigants are aware of the prevailing circumstances precluding the hearing of suits filed after 2016 to date. He prayed for the application to be dismissed with costs because the circumstances do not permit prompt prosecution of suits.

Determination

8. Rule 16 (1) and (3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides that a party may apply to the Court for dismissal of a suit where no action has been taken within one year. The Court in **Utalii Transport Company Limited & 3 others v NIC Bank Limited & another [2014]eKLR** held:

> **"Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution. These principles are:**

1) Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;

2) Whether the delay is intentional, contumelious and, therefore, inexcusable;

3) Whether the delay is an abuse of the court process;

4) Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;

5) What prejudice will the dismissal occasion to the plaintiff?

6) Whether the plaintiff has offered a reasonable explanation for the delay;

7) Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court;"

9. The Applicant's contention is that the Respondent has failed to fix the matter for hearing after it was certified ready for hearing on 22.1.2019.However the Respondent explained that the delay in fixing a hearing was not due to his willful neglect but due to lack of space in the court diary and annexed a copy of Notice dated 7.11.2020 by the Deputy registrar of the Court inviting litigants to fix hearing dates from 22.11.2020. The Notice indicated that only matters filed 2016 and earlier could be allocated hearing dates.

10. I have considered the explanation by the claimant and noted from the said notice dated 22.11.2020 that indeed the delay to set down the suit for hearing was not entirely to be blamed on the claimant. It is in the public domain that there has been a persistent problem of case backlog in the country's justice system and more in this Court which has only 12 judges to serve the whole nation.

11. As a result, the delay in the hearing and determination of this matter has not been occasioned by the Respondent but by the Court's operations. Article 159 (2) (b) of the Constitution provides that one of the principles that should guide court's in exercising judicial authority is that justice shall not be delayed. It would therefore be unjust for this Court to dismiss a matter where the delay in delivering justice has been occasioned by inevitable circumstances it is faced with.

12. I gather support from **David Eris v Baloon Safaris Limited [2018] eKLR** where Wasilwa J held:

> **"I agree that the Claimants have not prosecuted this case since it was filed in 2016. However, I take judicial notice of the fact the registry has not been able to allow some cases to be fixed for hearing given the heavy backlog that this Court has been facing. The Claimant cannot therefore be wholly to blame for their inaction in prosecuting this case. The Claimants have also submitted that they are willing to prosecute this case."**

13. Consequently, I dismiss the application with no costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2021

ONESMUS N. MAKAU

JUDGE

<u>ORDER</u>

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE